

The concepts of disability and reasonable accommodation in EU Law and the UNCRPD



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The EU legal framework

- **Article 19 of the TFEU** gives the EU the power to take action combating discrimination:
"Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."
- **The Charter of Fundamental Rights** includes two explicit references to disability :
 - Art. 21 of the Charter lists disability as one of the grounds on which discrimination must be prohibited.
 - Art. 26 deals with the "Integration of persons with disabilities" and states: "The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community".

The United Convention on the Rights of Persons with Disabilities (UNCRPD) as part of the EU legal order

- The European Union has acceded to the UNCRPD with Council Decision 2010/48/EC.
- The instrument of ratification was deposited in December 2010, after the adoption of a Code of Conduct by the Council. The Council Decision has 2 substantive legal bases, namely Article. 19 TFEU (non discrimination) and article 114 TFEU (measures aiming to improve the conditions for the establishment and functioning of the internal market) , in conjunction with the procedural provision of article 218 TFEU (agreements between the Union and third countries or international organisations).
- It is the first time ever that the EU becomes a party to an international human rights treaty and it is also the first time that an intergovernmental organization join a United Nations human rights treaty.

- The UNCRPD, as other multilateral agreements that make provision for participation by regional organisations such as the EU alongside its Member States, provides for a Declaration of competence specifying which areas of the agreement fall within the competence of the Regional organization and which within that of its Member States.
- The UNCRPD is a mixed agreement. Mixed agreements are signed and concluded by the EU and its Member States on the one hand, and by a Third Party on the other hand. The mixed nature is due to the fact that part of an international agreement falls within the scope of the EU powers and part within the scope of the powers of the Member States.
- An international agreement has legal effect in the EU legal order and does not require further acts of implementation at EU level such as a regulation or a directive. Moreover, in the hierarchy of sources of EU law, international agreements concluded between the EU and third countries or international organisations are situated below primary sources and general principles of EU law, but above secondary sources. The ECJ held that international agreements and all acts of the EU institutions adopted in relation to their conclusion prevail over secondary sources of EU law.

- As a result, all EU unilateral measures such as regulations, directives and decisions must be in conformity with international agreements in so far as their provisions fall within the scope of Community competence. Any conflicting secondary legislation may be annulled by the ECJ by virtue of Article 263 TFEU.
- The primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (ECJ Case C-61/94). The accession to the UNCRPD creates therefore an obligation to interpret EU law in manner that is consistent with the Convention (Ring vs Dansk almennyttigt Boligselskab DAB – ECJ Case C2335/11).
- In ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement (Case C-239/03, Etang de Berre). Therefore, the Commission might bring an infringement case against Member State not properly implementing the UNCRPD insofar as its provisions are within the scope of the EU competence.

The Council Directive 2000/78/EC

- Secondary European anti-discrimination legislation in respect to disability was introduced in the European Union through the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
- This “general” framework entails “specific” provisions dealing with disability :
 - **Art 2. (1) (b) - Indirect discrimination**
 - **Art 5. - Reasonable accommodation**
 - **Art 7 (2) - Positive action**
 - **Recitals (17), (20) and (21)**

Indirect discrimination (art.2 (1)(b))

*"Indirect discrimination shall not be taken to occur when as regards **persons with a particular disability**, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice".*

Reasonable accommodation (art 5)

"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned"

Recitals

- (17) *This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.*
- (20) *Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.*
- (21) *To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance.*

Positive action (art.7 (2))

*“With regard to **disabled persons**, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”*

The concept of reasonable accommodation

- First recognised with respect to religion.
- The concept of reasonable accommodation is a central tenet of the so-called “social model” of disability.
- The denial of reasonable accommodation as a sui generis form of discrimination.

Reasonable accommodation : key elements

- Reasonableness
- Disproportionate burden
- Fitness for work
- Reasonable accommodation vs. positive action

Definition of disability

- As with other grounds specified in the framework directive, no definition is provided of the term disability.
- *"The Commission's view that definitions of key concepts can simply be "left to Member States" is an over-simplification. EU-wide definitions will evolve as cases reach the Court of Justice. This will be a long process, and there will inevitably be a period of uncertainty as cases are taken through the courts".*

House of Lords Select Committee (2000)

The jurisprudence of the ECJ on the definition of disability

From 2006, the ECJ has wrestled with the definition of disability in EU law in seven judgments :

- **Chacón Navas** v Eurest Colectividades SA (2006) - Case C-13/05.
- **Coleman** v Attridge Law (2008) - Case C-303/06.
- **Ring** v Dansk almennyttigt Boligselskab DAB (2013) – Case C-335/11 en **Werge** v Pro Display A/S- Case C-337/11.
- **Glatzel** v Freistaat Bayern (2014) – Case C-356/12.
- **Z** v A Government Department and the Board of Management of a Community School (2014) - Case C-363/12.
- **Kaltoft** v Kommunernes Landsforening (2015) – Case C-354/13
- **Daouidi** v Bootes Plus SL and Others (2016) – Case C-395/15

Chacon Navas (Case C13/05) - Background

- Sonia Chacón Navas had been ill at home for several months when she received notification from her employer, Eurest Colectividades, that her contract will be terminated. The notification letter acknowledged that her dismissal was unlawful and it included the employer's offer to pay financial compensation. Spanish law distinguishes between unlawful and void dismissals. Dismissals are void when they fail some of legal requirements, for instance, the prohibition to discrimination on grounds such as gender or disability.
- Differences in the available remedies explain the importance of the distinction between unlawful and void dismissals. If the dismissal is deemed void, the employee has the right to be reinstated in the position from which he was wrongfully dismissed, as well as the right to any unpaid remuneration. This the reason why Mrs Chacon Navas took a legal claim against Eurest on the basis that her dismissal amounted to disability discrimination.
- The Spanish court, to which the claim was taken, took the view that a dismissal on the grounds of sickness could amount to a form of disability discrimination. However, in the absence of a definition of disability under Spanish law, the court referred the case to the ECJ.

ECJ Ruling on Chacon Navas (2006)

- The Court ruled that :
 - the concept of "disability" for the purpose of Directive 2000/78 must, be given an autonomous and uniform interpretation throughout the Community;
 - someone dismissed solely on account of sickness could not fall within the general framework laid down in the directive for combating discrimination on grounds of disability;
 - disability must be understood as referring to *"a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"*;
 - in order for the limitation to fall within the concept of 'disability', it must therefore be probable that it will *last for a long time*.

Comments on Chacon Navas

- The definition adopted by the Court assumed that medical impairments themselves, not the work environment, hinder professional life.
- This definition was surprising because the Court's reasoning seemed markedly uninformed by the historical, political, and normative debate regarding the meaning of disability in Europe and abroad. Not once in the entire judgment hints the Court at the evolution of the disability policy or refers to the scientific conceptual framework provided by the International Classification of Functioning, Disability and Health (ICF) adopted by the WHO in 2001.
- Instead, the court focused its attention towards the definitional question from a medical perspective. It looked specifically at the medical impairment and turned to issues such as the nature and severity of the impairment or the duration or expected duration of the impairment.
- The ECJ ruling was made before the adoption of the UNCRPD by the United Nations General Assembly (December 2006).

Coleman (Case C303/06) - Background

- Mrs Coleman had a disabled son, Oliver. She worked as a secretary for a London law firm Attridge Law. They accused her of using her child as a way to manipulate requests for working time. Mrs Coleman lodged a claim with the Employment Tribunal, alleging that she had been subject to unfair dismissal and had been treated less favourably than other employees because she was the primary carer of a disabled child.
- However, under the UK Disability Discrimination Act 1995, it states that one may consider oneself discriminated against (leading to unfair dismissal compensation) only if the treatment is "against a disabled person". Because Mrs Coleman was not herself disabled, the question was whether the 1995 Act had properly implemented the Directive 2000/78/EC on the matter.
- The Employment Tribunal referred the matter to the Court of Justice, asking whether the directive on equal treatment in employment and occupation must be interpreted as prohibiting direct discrimination on grounds of disability and harassment related to disability only in respect of an employee who is himself disabled, or whether the directive applies equally to an employee who is treated less favourably by reason of the disability of his child.

ECJ Ruling on Coleman (2008)

- The directive, the purpose of which is to combat all forms of discrimination, applies not to a particular category of person but by reference to the nature of the discrimination.
- An interpretation limiting its application only to people who are themselves disabled is liable to deprive the directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.

Remarks on Coleman

- In Coleman, the Court's approach explicitly rejected the calls for a narrow interpretation of the principle of equal treatment on the ground that such an interpretation would hamper the social and economic integration of persons with disabilities. The ECJ used a teleological interpretation seeking to achieve the objectives of the legislation.
- The Advocate general pointed out that the denial of protection against discrimination by association would harm persons with disabilities by limiting the protection of their caregivers.
- The Court more or less ignored the Chacon Navas decision, or at least the textual perspective adopted in that case. The Court's judgment mentions that its judgement on Chacon Navas did not hold that the principle of equal treatment should be interpreted strictly within the scope of the Directive.
- The ECJ ruling was made after the adoption of the UNCRPD by the United Nations General Assembly (December 2006) but before the ratification of the Convention by the European Union (December 2010).

Jette Ring (Case C-335/11) - Background

- Mrs. Ring and Mrs. Werger were dismissed by their respective employers with a one month notice using a special rule in Danish labour law that makes it possible to dismiss on such short notice an employee who during a 12 months period has had 120 days of paid sickness leave.
- Mrs. Ring and Mrs. Werger claimed that they could have continued working if they would have been accommodated with some special office furniture and a reduction in working time.
- The women, with the help of their trade union (HK Danmark), issued proceedings at the national court, stating that their dismissal and the special one month notice rule amounted to discrimination on the ground of disability, as prohibited under Danish equal treatment law.
- Since the Danish law in fact implements the Equality Directive 2000/78, the national court asked preliminary questions to the CJEU in order to clarify the obligations under this Directive.

Jette Ring (Case C-335/11) Background – cont.

- Three key legal questions as regards disability discrimination were referred to the ECJ :
 - the definition of a disability : is any person who, because of physical, mental or psychological injuries, cannot or can only to a limited extent carry out his work in a period that satisfies the requirement as to duration specified in Navas case covered by the concept of disability within the meaning of the directive?
 - the question what can count as a reasonable accommodation : is a reduction in working hours among the measures covered by Article 5 of Directive 2000/78/EC?
 - the question whether national legislation under which it is possible to dismiss employees who have used their right for paid sickness leave on a shorter notice than other employees is in compliance with EU law.

ECJ Ruling on Jette Ring (2013)

- Disability must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from mental, physical or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.
- A reduction in working hours may constitute one of the accommodation measures.
- The Danish legislation may not be applied in a case where it concerns a disabled person and where in fact the disablement is partly due to the fact that the employer has not taken appropriate measures. The law could also be invalid since it may be presumed that disabled persons will more easily meet the 120 days criterion than non-disabled persons who are merely sick. It is for the national court to decide whether the Danish Government has an objective justification for having this legislation in place and applying it also to disabled persons.

Remarks on Jette Ring

- The ECJ recalled that the primacy of international agreements concluded by the European Union over instruments of secondary and made it clear that the EU concept of 'disability' must be interpreted in a manner consistent with the UNCRPD.
- In order to be consistent with the Convention, the ECJ adopted a new definition of disability. Disability must be understood as referring to limitations which result from :
 - (i) **long-term...**
 - (ii) **physical, mental or psychological** impairments
 - (iii) which in **interaction with various barriers**
 - (iv) **may hinder** the full and effective participation of the person in professional life
 - (v) on an **equal basis** with other workers
- This definition covers not only disabilities that are congenital or result from accidents, but also those caused by illness. The ECJ also stated that there was nothing in the wording of Directive 2000/78 to indicate that its scope of application is limited to a certain degree of severity of disability.

Z (Case C363/16) - Background

- Ms Z., a teacher working in Ireland, has a rare condition which has the effect that, she has no uterus and therefore cannot support a pregnancy. Ms Z. and her husband had a child as a result of an agreement with a surrogate mother in California. Genetically, the child is the couple's son and there is no reference to the surrogate mother's identity on the child's US birth certificate. Under Californian law, Ms Z. and her husband are considered the baby's parents.
- Ms Z. applied for paid leave equivalent to maternity leave or adoption leave. The application was refused on the grounds that Ms Z. had never been pregnant and the child not be adopted by the parents.
- The national tribunal before which the Ms Z. brought actions had asked whether such a refusal is contrary to the Pregnant Workers Directive or whether it constitutes discrimination on grounds of sex or of disability (both types of discrimination being prohibited under the Equal Treatment Directive and Employment Equality Framework Directive respectively).

ECJ Ruling on Z. (2014)

- As regards the Employment Equality Framework Directive, the Court considers that it cannot be disputed that a woman's inability to bear her own child may be a source of great suffering for her. However, the concept of 'disability' within the meaning of that directive presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers.
- In principle, the inability to have a child by conventional means does not, in itself, prevent the commissioning mother from having access to, participating in or advancing in employment.
- That being the case, the Court finds that the inability to have a child does not constitute a 'disability' within the meaning of the Employment Equality Framework Directive and, therefore, that that directive is not applicable in a situation such as that at issue here.

Comments on Z.

- The Court referred to Article 1 UNCRPD and again firmly stated that the Equal treatment directive must, as far as possible, be interpreted in a manner that is consistent with the UNCRPD.
- The ECJ accepted that Mrs Z may have a disability within the meaning of the UNCRPD. However, the Court relied on the limited scope of the directive *ratione materiae*, as the directive only targets disabilities that make a worker's involvement in professional life more burdensome, which is not the case for medical conditions that prevent women from getting pregnant.

Glatzel (Case C356/12) - Background

- Mr Glatzel was denied a driving licence for heavy goods vehicles by the Bavarian Authorities because the visual acuity in his worse eye did not reach the minimum level of acuity required in the Annex III to the Directive of the European Parliament and of the Council of 20 December 2006 on driving licences.
- The National referring court essentially asked the ECJ to determine the validity of the visual acuity requirement of the Annex III to the Directive in the light of Articles 20, 21(1) and 26 of the European Charter of Fundamental Rights concerning equality before the law, non-discrimination on grounds of disability, and the integration of persons with disabilities.

ECJ Ruling on Glatzel (2014)

- It is not necessary for the purpose of determining the validity of Directive 2006/126, in the light of Article 21(1) of the Charter, to determine definitively whether Mr Glatzel is considered to have a disability within the meaning of that provision. Even if the impairment of Mr Glatzel could be considered as falling within the definition of disability within the meaning of the Charter, the difference in treatment consisting in not issuing him with a driving licence for heavy good vehicles on the ground that his visual acuity is insufficient may be objectively justified in the light of overriding considerations of road safety.
- The principle of proportionality requires, in particular, the principle of equal treatment, to be reconciled as far as possible with the requirements of road safety which determine the conditions for driving motor vehicles.
- Although Article 26 of the Charter requires the European Union to respect and recognize the right of persons with disabilities to benefit from integration measures, this principle does not require the EU to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right.

Kaltoft (Case C356/12) - Background

- Mr Karsten Kaltoft worked for 15 years for the Municipality of Billund (Denmark) as a childminder. On 22 November 2010, the municipality terminated his employment contract. Throughout the duration of his employment contract, Mr Kaltoft was considered obese under the definition of the World Health Organization (WHO).
- Taking the view that the dismissal resulted from unlawful discrimination on grounds of obesity, the Fag og Arbejde (FOA), a workers' union acting on behalf of Mr Kaltoft, brought proceedings before a Danish court seeking a declaration of that discrimination as well as compensation.
- In the context of assessing that request, the District Court of Kolding, Denmark asked the ECJ to specify whether EU law itself prohibits discrimination on grounds of obesity. It is also asking whether obesity can constitute a disability and therefore falls within the scope of the above directive.

ECJ Ruling on Kaltoft (2015)

- The ECJ recalls that no provision of the Treaties or of secondary EU legislation prohibits discrimination on grounds of obesity as such.
- As far as whether obesity can constitute a disability, the Court finds that if, under given circumstances, the obesity of the worker entails a limitation :
 - which results in particular from physical, mental or psychological impairments
 - which in interaction with various barriers
 - may hinder the full and effective participation of that person in professional life
 - on an equal basis with other workers,
 - and the limitation is a long-term one

Then such obesity can fall within the concept of 'disability' within the meaning of the directive.

- Such would be the case, in particular, if the obesity of the worker hindered that participation on account of reduced mobility or the onset of medical conditions preventing that person from carrying out work or causing discomfort when exercising professional activity.

Remarks on Kaltoft

- The Court simply restates its definition of disability settled in judgment Jette Ring (Case C-335/11). However, the judgment is interesting because it deals with obesity.
- Obesity cases are emblematic of legal definitions of disability that exclude individuals whose impairments are voluntarily induced. In holding that disability does not depend on the extent to which the person may or may not have contributed to the onset of his disability, the ECJ rejects the underlying motivations of moralism of such approaches.
- Kaltoft is also a further step towards an approach which would shift the judicial analysis away from the nature of the medical impairment and towards its discriminatory social effects. In Kaltoft, neither the Court or the advocate questioned whether obesity qualifies as an impairment.
- Although the Advocate general touched upon the issue, the ECJ did not elaborate on the notion of "perceived" impairment to address the case.

Daouidi (Case C356/12) - Background

- On 26 November 2014, while he was still temporarily unable to work, because of a dislocated shoulder, Mr Daouidi received a notice of disciplinary dismissal from his employer Bootes Plus.
- The Spanish court pointed out that there was sufficient evidence to assume that the true reason for the dismissal was not a disciplinary issue but his temporary inability to work for an indeterminate period of time as a result of his accident.
- The Spanish Court referred the case to the ECJ to ascertain whether he could be considered disabled for the purposes of European anti-discrimination legislation, given the uncertain duration of his incapacity.

ECJ Ruling on Daouidi (2016)

- The fact that a person is in a situation of temporary incapacity for work, as defined in national law, for an indeterminate amount of time, as the result of an accident at work, does not mean, in itself, that the limitation of that person's capacity can be classified as being 'long-term', within the meaning of the definition of disability laid down by that directive, read in the light of the UNCRPD.
- The evidence which makes it possible to find that such a limitation is "long-term" includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered; and
- In the context of the verification of that 'long-term' nature, the referring court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data.

Remarks on Daouidi

- Although the judgment does not provide particularly helpful guidance on it, the “long term” nature of the impairment requirement characterizing the EU definition underlines the persistence of a focus on the nature, rather than the social effect, of medical impairments.
- By insisting that impairment must be “long term”, the EU definition excludes from the protection against discrimination a vast array of workers with short-term, fluctuating, or episodic impairments.
- It should be recalled that the definition of disability in the UNCRPD is an inclusive rather than an exclusive definition. While article 1 UNCRPD refers to “long-term” impairments, this provision is not exhaustive of other impairments. In that regard, the UN Committee on the Rights of Persons with Disability, in *Ms. S.C v Brazil* (2014), specified that under Article 1 of the Convention, “persons with disabilities include, **but are not limited** to those who have long-term impairments.

Ruiz Conejero (Case C270/16) - Background

- Mr Ruiz Conejero worked for a company that provided cleaning services to a hospital. He suffered from degenerative joint disease, aggravated by obesity, a condition that amounted to a disability.
- He was dismissed as a result of the fact that the cumulative duration of his absences had exceeded the limits laid down in the Spanish Worker’s Statute. The Statute provides that a worker’s contract may be terminated for intermittent absences that amount to 20% of working hours in two consecutive months if the worker’s absences in the previous 12 months total 5% of working hours, or 25% of working hours in four non-consecutive months.
- When Mr Ruiz Conejero sought the annulment of his dismissal on the basis that it constituted discrimination based on disability, the Spanish Court referred the question of whether its national law discriminated against disabled workers to the ECJ.

Conclusion

- The distinction between the medical and social views of disability is clearly of profound political and philosophical importance to our understanding of the concept of human rights and disability.
- Using the UNCRPD as an interpretative tool for assessing the EU legislation, the European Court of Justice has progressively taken a positive and expanding approach to disability rights.
- With regard to the definition of disability, the case law of the ECJ underlines steps towards an increasingly social view of disability. When assessing the rights of persons with disabilities to be protected against discrimination, the legal analysis should be shifted away from the nature of the medical impairments of the person and towards the discriminatory social effects of such impairments.

